

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SAMUEL S. UPTHEGROVE,

Petitioner,

ORDER

08-cv-552-slc¹

v.

CHARLES TUBBS, PAUL WESTERHAUS,
MR. OURADA, BRUCE SUNDE, TERRY
TIMM, SUPERVISOR BRANDT, YC KRAFT,
YC GERDES, and JOHN DOES 1-26,

Respondents.

In an order entered November 6, 2008, I concluded that petitioner Samuel S. Upthegrove's complaint violated Fed. R. Civ. P. 20 and must be divided into four separate lawsuits. I ordered petitioner to advise the court which of the separate lawsuits he will prosecute and which, if any, he will withdraw voluntarily. Petitioner has responded, explaining that he will pursue the separate lawsuits identified as Lawsuits ##1 and 2. He has explained that he chooses the case identified as Lawsuit #2 to litigate using this case number. This lawsuit includes his claims that (a) respondents Tubbs, Westerhouse, Ourada, Sunde, Timm and Doe #1 failed to provide petitioner with access to the Wisconsin

¹Because the parties have not yet consented to the magistrate judge's jurisdiction to decide dispositive questions in this case, I am ruling on the question whether petitioner may proceed with one or more of the claims raised in his proposed amended complaint.

Administrative Code before he was punished and sent to segregation; (b) respondents Tubbs, Westerhouse, Ourada, Sunde, Timm and Doe #1 enforced a shower policy that resulted in petitioner being subjected to harassment, sexual assault and exposure of his genitalia to adults; (c) respondents Westerhouse, Ourada, Sunde, Timm and Doe #1 enforced a policy that allowed for a radio to play in petitioner's room from 6:30 a.m. to 10:30 p.m.; (d) respondents Westerhouse, Ourada, Sunde, and Doe #1 enforced a policy that prohibited petitioner from possessing newspapers and other publications; and (e) respondents Westerhouse, Ourada, Timm and Doe #1 failed to provide him with access to legal research materials and access to the courts.

In addition, petitioner has stated that he wishes to pursue the lawsuit identified as Lawsuit #1, which includes his claims that: (a) on March 19, 2005, respondents Brandt, Kraft, Gerdes, and John Does ##3-10 violated his Eighth Amendment rights during a cell entry; and (b) respondents Tubbs, Westerhouse, Ourada and Sunde are liable for that violation for failure to train their employees.

With respect to plaintiff's decision to proceed with the claims raised in Lawsuits #1, this action shall be severed forthwith and assigned case number 08-cv-661-slc. Petitioner owes a separate filing fee for the new case, but he is not required to make any initial payment to proceed in that case because he presently has no means with which to make the payment. The record in that case will include: (a) the complaint, dkt. #1; (b) the order

describing how petitioner's claims must be separated into separate lawsuits, dkt. #7; (c) plaintiff's response to that order, dkt. #9; and (d) this order.

To be clear,

- Petitioner's claims identified as Lawsuit #2 will be litigated in this case. Respondents Tubbs, Westerhouse, Ourada, Sunde, Timm and Doe #1 are the only respondents in this case;
- Petitioner's claims identified as Lawsuit #1 will be litigated in case no. 08-cv-661-slc. Respondents Brandt, Kraft, Gerdes, John Does ##3-10, Tubbs, Westerhouse, Ourada and Sunde are the only respondents in that case.

Petitioner has advised the court that he is willing to dismiss voluntarily the claims I identified as Lawsuits ##3 and 4. Therefore, as to respondents John Does ##2 and 11-26, plaintiff's complaint will be dismissed without prejudice.

ORDER

IT IS ORDERED that

1. The court accepts petitioner's decision to continue to prosecute in the context of this case the claims identified in this order as Lawsuit #2.
2. The court accepts petitioner's decision to proceed in one new case with the claims identified in this court's order as Lawsuit #1. This lawsuit is hereby SEVERED in accordance with Fed. R. Civ. P. 20 and assigned case no. 08-cv-661-slc.

3. Petitioner's claims identified in this court's order as Lawsuits ##3 and 4 are DISMISSED without prejudice.
4. Petitioner's complaint is DISMISSED as to respondents John Does ##2 and 11-26.

Entered this 14th day of November, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge